

Second Regular Session 114th General Assembly (2006)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type~~.

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~this style type~~ reconciles conflicts between statutes enacted by the 2005 Regular Session of the General Assembly.

SENATE ENROLLED ACT No. 359

AN ACT to amend the Indiana Code concerning state and local administration.

Be it enacted by the General Assembly of the State of Indiana:

SECTION 1. IC 4-13-2-20, AS AMENDED BY P.L.1-2005, SECTION 62, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2006]: Sec. 20. (a) Except as otherwise provided in this section, IC 12-17-19-19, or IC 12-8-10-7, payment for any services, supplies, materials, or equipment shall not be paid from any fund or state money in advance of receipt of such services, supplies, materials, or equipment by the state.

(b) With the prior approval of the budget agency, payment may be made in advance for any of the following:

- (1) War surplus property.
- (2) Property purchased or leased from the United States government or its agencies.
- (3) Dues and subscriptions.
- (4) License fees.
- (5) Insurance premiums.
- (6) Utility connection charges.
- (7) Federal grant programs where advance funding is not prohibited and, except as provided in subsection (i), the contracting party posts sufficient security to cover the amount advanced.

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- (8) Grants of state funds authorized by statute.
- (9) Employee expense vouchers.
- (10) Beneficiary payments to the administrator of a program of self-insurance.
- (11) Services, supplies, materials, or equipment to be received from an agency or from a body corporate and politic.
- (12) Expenses for the operation of offices that represent the state under contracts with the Indiana economic development corporation and that are located outside Indiana.
- (13) Services, supplies, materials, or equipment to be used for more than one (1) year under a discounted contractual arrangement funded through a designated leasing entity.
- (14) Maintenance of equipment and maintenance of software ~~not exceeding an annual amount of one thousand five hundred dollars (\$1,500) for each piece of equipment or each software license. if~~ **there are appropriate contractual safeguards for refunds as determined by the budget agency.**
- (15) Exhibits, artifacts, specimens, or other unique items of cultural or historical value or interest purchased by the state museum.

(c) Any state agency and any state college or university supported in whole or in part by state funds may make advance payments to its employees for duly accountable expenses exceeding ten dollars (\$10) incurred through travel approved by the employee's respective agency director in the case of a state agency and by a duly authorized person in the case of any such state college or university.

(d) The auditor of state may, with the approval of the budget agency and of the commissioner of the Indiana department of administration:

- (1) appoint a special disbursing officer for any state agency or group of agencies where it is necessary or expedient that a special record be kept of a particular class of disbursements or where disbursements are made from a special fund; and
- (2) approve advances to the special disbursing officer or officers from any available appropriation for the purpose.

(e) The auditor of state shall issue the auditor's warrant to the special disbursing officer to be disbursed by the disbursing officer as provided in this section. Special disbursing officers shall in no event make disbursements or payments for supplies or current operating expenses of any agency or for contractual services or equipment not purchased or contracted for in accordance with this chapter and IC 5-22. No special disbursing officer shall be appointed and no money shall be advanced until procedures covering the operations of special

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disbursing officers have been adopted by the Indiana department of administration and approved by the budget agency. These procedures must include the following provisions:

- (1) Provisions establishing the authorized levels of special disbursing officer accounts and establishing the maximum amount which may be expended on a single purchase from special disbursing officer funds without prior approval.
 - (2) Provisions requiring that each time a special disbursing officer makes an accounting to the auditor of state of the expenditure of the advanced funds, the auditor of state shall request that the Indiana department of administration review the accounting for compliance with IC 5-22.
 - (3) A provision that, unless otherwise approved by the commissioner of the Indiana department of administration, the special disbursing officer must be the same individual as the procurements agent under IC 4-13-1.3-5.
 - (4) A provision that each disbursing officer be trained by the Indiana department of administration in the proper handling of money advanced to the officer under this section.
- (f) The commissioner of the Indiana department of administration shall cite in a letter to the special disbursing officer the exact purpose or purposes for which the money advanced may be expended.
- (g) A special disbursing officer may issue a check to a person without requiring a certification under IC 5-11-10-1 if the officer:
- (1) is authorized to make the disbursement; and
 - (2) complies with procedures adopted by the state board of accounts to govern the issuance of checks under this subsection.
- (h) A special disbursing officer is not personally liable for a check issued under subsection (g) if:
- (1) the officer complies with the procedures described in subsection (g); and
 - (2) funds are appropriated and available to pay the warrant.
- (i) For contracts entered into between the department of workforce development or the Indiana commission on vocational and technical education and:
- (1) a school corporation (as defined in IC 20-18-2-16); or
 - (2) a state educational institution (as defined in IC 20-12-0.5-1);
- the contracting parties are not required to post security to cover the amount advanced.

SECTION 2. IC 4-13-18 IS ADDED TO THE INDIANA CODE AS A **NEW CHAPTER** TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2006]:

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Chapter 18. Drug Testing of Employees of Public Works Contractors

Sec. 1. This chapter applies only to a public works contract awarded after June 30, 2006.

Sec. 2. As used in this chapter, "bid" includes a quotation.

Sec. 3. (a) As used in this chapter, "contractor" refers to a person who:

- (1) submits a bid to do work under a public works contract; or
- (2) does any work under a public works contract.
- (b) The term includes a subcontractor of a contractor.

Sec. 4. As used in this chapter, "public works contract" refers to:

- (1) a public works contract covered by IC 4-13.6;
 - (2) a public works contract covered by IC 5-16 and entered into by a state agency; or
 - (3) a state highway contract covered by IC 8-23-9;
- when the estimated cost of the public works project is one hundred fifty thousand dollars (\$150,000) or more.

Sec. 5. (a) A solicitation for a public works contract must require each contractor that submits a bid for the work to submit with the bid a written plan for a program to test the contractor's employees for drugs.

(b) A public works contract may not be awarded to a contractor whose bid does not include a written plan for an employee drug testing program that complies with this chapter.

(c) A contractor that is subject to a collective bargaining agreement shall be treated as having an employee drug testing program that complies with this chapter if the collective bargaining agreement establishes an employee drug testing program that includes the following:

- (1) The program provides for the random testing of the contractor's employees.
- (2) The program contains a five (5) drug panel that tests for the substances identified in section 6(a)(3) of this chapter.
- (3) The program imposes disciplinary measures on an employee who fails a drug test. The disciplinary measures must include at a minimum, all the following:
 - (A) The employee is subject to suspension or immediate termination.
 - (B) The employee is not eligible for reinstatement until the employee tests negative on a five (5) drug panel test

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certified by a medical review officer.

(C) The employee is subject to unscheduled sporadic testing for at least one (1) year after reinstatement.

(D) The employee successfully completes a rehabilitation program recommended by a substance abuse professional if the employee fails more than one (1) drug test.

A copy of the relevant part of the collective bargaining agreement constitutes a written plan under this section.

Sec. 6. (a) A contractor's employee drug testing program must satisfy all of the following:

(1) Each of the contractor's employees must be subject to a drug test at least one (1) time each year.

(2) Subject to subdivision (1), the contractor's employees must be tested randomly. At least two percent (2%) of the contractor's employees must be randomly selected each month for testing.

(3) The program must contain at least a five (5) drug panel that tests for the following:

(A) Amphetamines.

(B) Cocaine.

(C) Opiates (2000 ng/ml).

(D) PCP.

(E) THC.

(4) The program must impose progressive discipline on an employee who fails a drug test. The discipline must have at least the following progression:

(A) After the first positive test, an employee must be:

(i) suspended from work for thirty (30) days;

(ii) directed to a program of treatment or rehabilitation; and

(iii) subject to unannounced drug testing for one (1) year, beginning the day the employee returns to work.

(B) After a second positive test, an employee must be:

(i) suspended from work for ninety (90) days;

(ii) directed to a program of treatment or rehabilitation; and

(iii) subject to unannounced drug testing for one (1) year, beginning the day the employee returns to work.

(C) After a third or subsequent positive test, an employee must be:

(i) suspended from work for one (1) year;

(ii) directed to a program of treatment or rehabilitation;

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(iii) subject to unannounced drug testing for one (1) year, beginning the day the employee returns to work.

The program may require dismissal of the employee after any positive drug test or other discipline more severe than is described in this subdivision.

(b) An employer complies with the requirement of subsection (a) to direct an employee to a program of treatment or rehabilitation if the employer does either of the following:

(1) Advises the employee of any program of treatment or rehabilitation covered by insurance provided by the employer.

(2) If the employer does not provide insurance that covers drug treatment or rehabilitation programs, the employer advises the employee of agencies known to the employer that provide drug treatment or rehabilitation programs.

Sec. 7. (a) The public works contract must provide for the following:

(1) That the contractor implement the employee drug testing program described in the contractor's plan.

(2) Cancellation of the contract by the agency awarding the contract if the contractor:

(A) fails to implement its employee drug testing program during the term of the contract;

(B) fails to provide information regarding implementation of the contractor's employee drug testing program at the request of the agency; or

(C) provides to the agency false information regarding the contractor's employee drug testing program.

(b) The provisions of the public works contract relating to cancellation of the contract by the agency awarding the contract apply to cancellation of the public works contract under this section.

SECTION 3. IC 4-13.6-3-3, AS AMENDED BY SEA 247-2006, SECTION 1, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2006]: Sec. 3. (a) There is established a certification board. The following persons shall serve on the certification board:

(1) The ~~chief engineer~~ **director of engineering** of the department of natural resources.

(2) The director.

(3) The building law compliance officer of the department of homeland security.

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(b) The board shall administer IC 4-13.6-4.

SECTION 4. IC 4-13.6-7-2 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2006]: Sec. 2. (a) If the estimated cost of a public works project is one hundred fifty thousand dollars (\$150,000) or more, the division shall include as part of the public works contract provisions for the retainage of portions of payments by the division to the contractor, by the contractor to subcontractors, and for the payment of subcontractors and suppliers by the contractor. The contract must provide that the division may withhold from the contractor sufficient funds from the contract price to pay subcontractors and suppliers as provided in section 4 of this chapter.

(b) A public works contract and contracts between contractors and subcontractors, if portions of the public works contract are subcontracted, ~~must~~ **may** include a provision that at the time any retainage is withheld, the division or the contractor, as the case may be, ~~shall~~ **may** place the retainage in an escrow account, **as mutually agreed**, with:

- (1) a bank;
- (2) a savings and loan institution;
- (3) the state of Indiana; or
- (4) an instrumentality of the state of Indiana;

as escrow agent. The parties to the contract shall select the escrow agent by mutual agreement. The parties to the agreement shall enter into a written agreement with the escrow agent.

(c) The escrow agreement must provide the following:

- (1) The escrow agent shall promptly invest all escrowed principal in the obligations that the escrow agent selects, in its discretion.
- (2) The escrow agent shall hold the escrowed principal and income until it receives notice from both of the other parties to the escrow agreement specifying the percentage of the escrowed principal to be released from the escrow and the persons to whom this percentage is to be released. When it receives this notice, the escrow agent shall promptly pay the designated percentage of escrowed principal and the same percentage of the accumulated escrowed income to the persons designated in the notice.
- (3) The escrow agent shall be compensated for its services as the parties may agree. The compensation shall be a commercially reasonable fee commensurate with fees being charged at the time the escrow fund is established for the handling of escrow accounts of like size and duration. The fee must be paid from the escrowed income of the escrow account.

(d) The escrow agreement may include other terms and conditions

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that are not inconsistent with subsection (c). Additional provisions may include provisions authorizing the escrow agent to commingle the escrowed funds held under other escrow agreements and provisions limiting the liability of the escrow agent.

SECTION 5. IC 5-16-5.5-1 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2006]: Sec. 1. As used in this chapter:

"State agency" means the state of Indiana or any commission or agency created by law.

"Agent" shall include any board, commission, trustee, officer or agent which acts on behalf of a state agency.

"Public building", "public work" and "public improvement" or combinations thereof shall be construed to include all buildings, work or improvements the cost of which is paid for from public funds but shall not include highways, roads, streets, alleys, bridges and appurtenant structures situated on streets, alleys, **railroad projects (as defined in IC 8-5-15-1)** and dedicated highway rights-of-way.

"Substantial completion" shall be construed to mean the date when the construction of a structure or building is sufficiently completed, in accordance with the plans and specifications, as modified by any completed change orders agreed to by the parties, so that the state agency can occupy the structure or building for the use for which it was intended. Furthermore, the warranty period shall commence no later than the date of substantial completion.

"Contractor" shall mean any person, firm, limited liability company, or corporation who is party to a contract with a state agency to construct, erect, alter or repair any public building or is any way involved in public work or public improvement.

"Subcontractor" shall mean and include any person, firm, limited liability company, or corporation who is a party to a contract with the contractor and who furnishes and performs on-site labor on any public building, work or improvement. It also shall include materialmen who supply contractors or subcontractors as contained herein.

"Retainage" means any amount to be withheld from any payment to a contractor or subcontractor pursuant to the terms of a contract until the occurrence of a specified event.

"Escrowed principal" shall mean the value of all cash and securities or other property at the time placed in an escrow account.

"Escrowed income" shall mean the value of all property held in an escrow account over the escrowed principal in such account.

SECTION 6. IC 5-22-7.3 IS ADDED TO THE INDIANA CODE AS A NEW CHAPTER TO READ AS FOLLOWS [EFFECTIVE

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JULY 1, 2006]:

Chapter 7.3. Negotiated Bidding

Sec. 1. (a) This chapter applies only to a purchasing agency in the executive branch.

(b) Subject to the policies of the purchasing agency, a purchasing agent may follow the procedure described in this chapter in awarding a contract for supplies instead of awarding a contract under IC 5-22-7.

Sec. 2. (a) A purchasing agent may issue an invitation for bids.

(b) An invitation for bids must include the following:

- (1)** A purchase description.
- (2)** All contractual terms and conditions that apply to the purchase.
- (3)** A statement of which, if any, of the following will be used to evaluate bids:
 - (A)** Inspection.
 - (B)** Testing.
 - (C)** Quality.
 - (D)** Workmanship.
 - (E)** Delivery.
 - (F)** Suitability for a particular purpose.
 - (G)** The requirement imposed under IC 5-22-3-5.
 - (H)** Any other evaluation criteria stated in the invitation for bids.
- (4)** The procedure for opening the bids, including the date, time, and place for opening the bids.
- (5)** A statement concerning whether a bid must be accompanied by a certified check or other evidence of financial responsibility that may be required in accordance with policies of the purchasing agency.
- (6)** A statement concerning the conditions under which a bid may be canceled or rejected in whole or in part as specified under IC 5-22-18-2.
- (7)** A statement concerning whether, and the procedures under which, discussions may be conducted with bidders before a contract is awarded. The procedures for conducting discussions with bidders must be consistent with fair competition among all bidders.

Sec. 3. Evaluation criteria that will:

- (1)** affect the bid price; and
 - (2)** be considered in the evaluation for an award;
- must be objectively measurable.

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Sec. 4. Only criteria specified in the invitation for bids may be used in bid evaluation.

Sec. 5. (a) The purchasing agency shall:

- (1) give notice of the invitation for bids in the manner required by IC 5-3-1; and**
- (2) provide electronic access to the notice through the computer gateway administered by the office of technology.**

Sec. 6. (a) An employee of the purchasing agency shall open bids in the presence of one (1) or more other employees of the purchasing agency according to the procedure stated in the invitation for bids as required by section 2(b)(4) of this chapter.

(b) Individuals other than employees of the purchasing agency may not be present at an opening of bids unless the bids are opened publicly.

Sec. 7. Bids must be:

- (1) opened so as to avoid disclosure of contents to competing bidders during the process of negotiation; and**
- (2) evaluated based on the requirements provided in the invitation for bids.**

Sec. 8. A contract must be awarded with reasonable promptness by written notice to the lowest responsible and responsive bidder.

Sec. 9. (a) The purchasing agency shall prepare a bid register.

(b) The bid register must contain the following:

- (1) A copy of all documents that are included as part of the invitation for bids.**
- (2) A list of all persons to whom copies of the invitation for bids were given.**
- (3) A list of all bids received. The list of bids received must include the following information:**
 - (A) The name and address of each bidder.**
 - (B) The dollar amount of all bid prices received during the bidding process.**
 - (C) The name of the successful bidder and the dollar amount of that bidder's bid.**
- (4) The basis on which the award was made.**
- (5) Documentation of the purchasing agency's negotiating process with bidders. The documentation must include the following:**
 - (A) A log of the date and times of each meeting with a bidder. The log must include the identity of the bidder.**
 - (B) A description of the nature of all communications with each bidder.**

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(C) Subject to subdivision (6), a copy of all written communications, including electronic communications, with each bidder.

(6) The entire contents of the contract file except for proprietary information included with a bid, such as trade secrets, manufacturing processes, and financial information that was not required to be made available for public inspection by the terms of the invitation for bids.

(c) Except as provided in section 10 of this chapter, the bid register is subject to public inspection only after the contract award.

Sec. 10. (a) This section applies only if the amount of the purchase is more than two hundred thousand dollars (\$200,000).

(b) After the purchasing agency has completed any negotiations, the purchasing agency shall set a date, time, and place for publishing the bid register required by section 9 of this chapter. The date set under this subsection may not be less than seven (7) days before the purchasing agency notifies the successful bidder of the award of the contract.

Sec. 11. (a) The purchasing agency may establish policies to allow any of the following:

- (1) Correction or withdrawal of inadvertently erroneous bids before or after an award.
- (2) Cancellation of awards or contracts based on a mistake described in subdivision (1).

(b) Except as provided in a rule or policy, a purchasing agency must make a written decision to:

- (1) permit the correction or withdrawal of a bid; or
- (2) cancel awards or contracts based on bid mistakes.

Sec. 12. If a bidder inserts contract terms or bids on items not specified in the invitation for bids, the purchasing agent shall treat the additional material as a proposal for addition to the contract and may do any of the following:

- (1) Declare the bidder nonresponsive.
- (2) Permit the bidder to withdraw the proposed additions to the contract in order to meet the requirements and criteria provided in the invitation for bids.
- (3) Accept any of the proposed additions to the contract, subject to section 13 of this chapter.

Sec. 13. (a) The purchasing agent may not accept proposed additions to the contract that are prejudicial to the interest of the governmental body or fair competition.

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(b) A decision of the purchasing agent to permit a change to the requirements of the invitation for bids must be supported by a written determination by the purchasing agency.

SECTION 7. IC 5-22-7.5-2 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2006]: Sec. 2. (a) Before conducting a reverse auction, the purchasing agency must adopt written policies that do the following:

- (1) Establish procedures for all the following:
 - (A) Transmitting notices, solicitations, and specifications.
 - (B) Receiving offers.
 - (C) Making payments.
 - (D) Protecting
 - ~~(i) the identity of a bidder or an offeror. and~~
 - ~~(ii) the amount of an offer until the time fixed for the opening of offers.~~
 - (E) For a reverse auction, providing for the display of the amount of each offer previously submitted for public viewing.
 - (F) Establishing the deadline by which offers must be received and will be considered to be open and available for public inspection.
 - (G) Establishing the procedure for the opening of offers.
- (2) Require the purchasing agency to maintain adequate documentation regarding reverse auctions so that the transactions may be audited as provided by law.

(b) Written policies that comply with rules for an Internet public purchasing site adopted by the Indiana department of administration under IC 4-13-17-4 satisfy the requirements of this section.

SECTION 8. IC 5-22-9-1 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2006]: Sec. 1. **(a)** When a purchasing agent makes a written determination that the use of competitive sealed bidding is either not practicable or not advantageous to the governmental body, the purchasing agent may award a contract using the procedure provided by this chapter instead of competitive sealed bidding under IC 5-22-7.

(b) This subsection applies only to a purchasing agent in the executive branch. Notwithstanding subsection (a), and subject to the policies of the purchasing agency, a purchasing agent may award a contract using the procedure provided by this chapter.

SECTION 9. IC 5-22-9-9 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2006]: Sec. 9. **(a)** Offerors must be accorded fair and equal treatment with respect to any opportunity for discussion and revisions of proposals.

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(b) Except as provided in subsection (c), in conducting discussions with an offeror, information derived from proposals submitted by competing offerors may not be disclosed.

(c) This subsection applies only to a purchasing agency in the executive branch. In conducting discussions with an offeror, information derived from proposals submitted by competing offerors may be used in discussion only if the identity of the offeror providing the information is not disclosed to others. The purchasing agency must provide equivalent information to all offerors with which the purchasing agency chooses to have discussions.

SECTION 10. IC 5-22-14-3, AS AMENDED BY P.L.4-2005, SECTION 31, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2006]: Sec. 3. (a) A governmental body may adopt rules to implement this chapter. The Indiana department of administration shall adopt rules under IC 4-22-2 to implement this chapter.

(b) The rules adopted by a governmental body must establish criteria for determining qualifications as a small business. In establishing criteria, the rules may use any standards established for determination of small business status that are used by an agency of the federal government. A governmental body may also receive assistance from the Indiana economic development corporation to establish criteria or to implement the rules.

(c) The rules adopted by a governmental body may consider the number of employees employed by an offeror and the dollar volume of the offeror's business. The rules must provide that when computing the size of an offeror, the annual sales and receipts of the offeror and all of its affiliates must be included.

(d) The rules adopted by a governmental body must include the following criteria:

- (1) A wholesale business is not a small business if its annual sales for its most recently completed fiscal year exceed four million dollars (\$4,000,000).
- (2) A construction business is not a small business if its average annual receipts for the preceding three (3) fiscal years exceed four million dollars (\$4,000,000).
- (3) A retail business or business selling services is not a small business if its annual sales and receipts exceed five hundred thousand dollars (\$500,000).
- (4) A manufacturing business is not a small business if it employs more than one hundred (100) persons.
- (5) A business in any of the following sectors is not a small**

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**business if it employs more than one hundred (100) persons or
if its annual sales exceed five million dollars (\$5,000,000):**

(A) Information technology.

(B) Life sciences.

(C) Transportation.

(D) Logistics.

SECTION 11. IC 5-22-7.5-8 IS REPEALED [EFFECTIVE JULY
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President of the Senate

President Pro Tempore

Speaker of the House of Representatives

Governor of the State of Indiana

Date: _____ Time: _____

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